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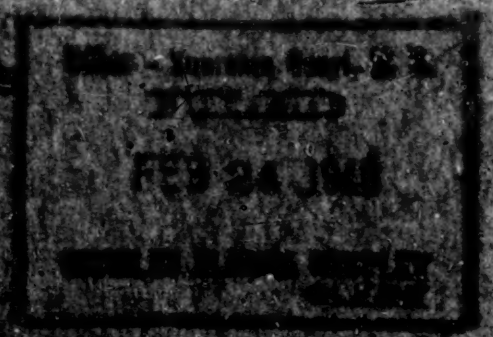

No. 618

In the Supreme Court of the United States

October Term, 1947

In the District Court of the United States For the Southern District of Indiana, Indianapolis Division

Civil No. 1072

AYRSHIRE COLLIERIES CORPORATION, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT.

Civil No. 1076

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment of the District Court be affirmed. This is a direct appeal from the final judgment entered November 28, 1947, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing

appellants' complaints to set aside an order of the Interstate Commerce Commission.[1] Appeal was allowed on January 21, 1948, and appeal papers were served on January 23, 1948.[2]

The Commission's order, dated July 9, 1945, required the rail carriers participating in the transportation concerned to cancel certain proposed rates on bituminous coal from Indiana and Western Kentucky to points in Northern Illinois and to Beloit, Wisconsin, without prejudice to the establishment of rates on the basis approved in the Commission's report which is a part of the said order. The order further required the carriers to desist from practicing the unjust discrimination and the undue prejudice and preference found in said report to exist, and required them to publish, maintain and apply rates which will avoid and remove the said unjust discrimination and undue prejudice and preference. *Coal to Beloit, Wisconsin, and Northern Illinois*, 263 I. C. C. 179.

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[1] The two cases were consolidated by order of the District Court. The Court made comprehensive findings of fact and conclusions of law, and also rendered a memorandum opinion. A previous decision of the District Court upholding the Commission's order made on June 5, 1946, was reversed on appeal because one of the members of the three judge court had been ill and had not participated in the decision. *Ayrshire Collieries Corporation* v. *United States*, 331 U. S. 132.

[2] It does not appear that notice of appeal was served upon the Attorney General of Indiana, in accordance with the provisions of 28 U. S. C. 47a.

It is submitted that the appeal presents no substantial questions, and that the judgment of the District Court should be affirmed without argument.

A somewhat extensive statement of the history of the rates involved is necessary in order to elucidate the legal issues in the case. The questions of law arising from the facts of the case are not novel or difficult. However, the history and character of the bituminous coal rate adjustment in the territory affected requires explanation in some detail.

The Commission's order was made in consolidated proceedings involving Investigation and Suspension Docket No. 5139, wherein Indiana interests protested against increased rates on bituminous coal from certain Indiana mines to Beloit, Wisconsin, and from Indiana and Western Kentucky to Rockford, Freeport, Dixon, and a number of other Illinois points north and west of Chicago; and No. 28881, wherein the Commission, upon its own motion but following a petition filed by certain rail carriers in Illinois, entered upon an investigation concerning the lawfulness of intrastate rates from Illinois mines to the Northern Illinois destinations involved.

The tariffs involved in the Investigation and Suspension proceeding were published by the participating carriers in purported compliance with the Commission's decision in *Fairbanks-Morse &*

Co. v. Alton & Southern Railroad, 195 I. C. C. 365, 251 I. C. C. 181. In that case, the Commission found that rates to Beloit, Wisconsin, would be unduly prejudicial to Beloit and unduly preferential of Rockford, Illinois, to the extent that the Beloit rate was higher than the Rockford rate by more than 15¢. The railroads involved chose to comply with the Commission's requirement of a 15¢ differential by increasing the rate to Rockford, rather than by reducing the rate to Beloit.

At the same time, moreover, the carriers proposed increases to Beloit, except that the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (hereinafter referred to as the Milwaukee), proposed no changes in rates via its single line from the Brazil and Linton groups[3] in Indiana to Beloit, and the Southern Railway and the Algers, Winslow & Western Railway did not propose any changes in their rates from the Princeton group in Indiana to Beloit. No change was proposed from points in the Booneville group in Indiana (on the Southern), nor in rates from the Illinois groups to Beloit.

The Commission's order here under attack, however, would require the appellant Milwaukee to increase its rates to the extent necessary to comply with the rate level prescribed in the Commission's order for all carriers.

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[3] "Groups" are areas within which every point of origin takes the same rate.

In the opinion of the carriers, the rates to Rockford and other destinations in Northern Illinois have been lower than the general level of rates, as a result of intrastate rates prescribed by the Illinois Commerce Commission from Southern Illinois mines. In 1930 the Illinois Commission required a reduction in intrastate rates to Rockford and certain other Northern Illinois destinations. The Interstate Commerce Commission on March 8, 1932, declined to require an increase restoring the previously existing higher intrastate rates unless and until the interstate rates from Indiana mines to the same destinations were also increased to a level more nearly commensurate with the general level of rates in the territory. *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537, 550.

By schedules filed to become effective on December 23, 1932, the Milwaukee proposed to reduce its interstate rates, from mines on its line in the Brazil-Clinton and Linton-Sullivan groups in Indiana, to Rockford and other Illinois points. These reductions were comparable to those made in the intrastate rates from Illinois. The Interstate Commerce Commission suspended the Milwaukee schedules, but the Commission's order was held invalid by this Court. *Coal from Indiana to Illinois,* 197 I. C. C. 245; 200 I. C. C. 609; *United States* v. *Chicago, M., St. P. & P. Railroad Co.,* 294 U. S. 499 (1935). Accordingly

the Milwaukee rates became effective in 1934, with the result that its single line rates were lower than joint line rates participated in by the Milwaukee between the same points. The expression "dual basis of rates" is employed in the Commission's report to describe this situation. (263 I. C. C. at 189, 214.)

Under the schedules involved in Investigation and Suspension Docket No. 5139, the so-called dual basis of rates would apply not only from the Brazil and Linton groups, as at present, but also from the Princeton group in Indiana; and would also be extended to apply to Beloit, in destination territory. In this respect the instant proposal differs from that which the Commission on March 13, 1939, approved in *Coal to Illinois and Wisconsin,* 232 I. C. C. 151, where proposed increases in the rates from Indiana and Western Kentucky to Northern Illinois points were found justified, but were never put into effect because the Illinois Commission disapproved a similar increase in intrastate rates from Southern Illinois. (263 I. C. C. at 182–3, 191, 213.)

The proposed schedules involved in I. & S. No. 5139 would increase the rate to Rockford from Southern Illinois to $2.25. This increase of 15 cents to Rockford would comply with the Commission's decision in the *Fairbanks-Morse* case, *supra,* since the existing Rockford rates are generally 30 cents lower than Beloit, and the 15-

cent increase to Rockford would result in the 15-cent differential called for by the Commission's decision in that case.

But corresponding increases in the rates to Rockford from all groups in Indiana, Illinois, and Western Kentucky were also proposed, in order to preserve the established relationships between the various points of origin for coal shipments. This adjustment would mean a 15¢ increase in the joint-line rate from Brazil to Rockford, making that rate $2.12; to Beloit the joint-line rate from Brazil would be 15¢ higher, or $2.25, an increase of 17¢ over the present rate of $2.10.

However, the proposed schedules contemplated no change in the Milwaukee's single-line rate from Brazil to Beloit. That rate at present is $2.10, and would remain at that figure; while the Milwaukee's single-line rate to Rockford, now $1.80 (or 30¢ less than Beloit), would be increased to $1.95, and thus would comply with the Commission's decision in the *Fairbanks-Morse* case, *supra*.

Thus the existing 17¢ disparity between the Milwaukee's single-line and joint-line rates from Brazil, now confined to the rates to Rockford and other Northern Illinois destinations, would under the proposed schedules, be extended so as to affect the rates to Beloit as well.

Similarly, the existing 12¢ disparity between the joint-line rates and the single-line rates of the Milwaukee and of the Illinois Central from the Linton group would be continued. But, furthermore, a disparity would be newly created from the Princeton group by the new schedules, since the joint-line rate to Beloit would be there increased from $2.27 to $2.32, while the existing rate of $2.27 would continue to apply from mines on the Southern and on the Algers, Winslow & Western. Likewise no change would be made from Booneville, served only by the Southern. The present rate from there to Beloit is $2.30. (263 I. C. C. at 190.)

The Commission made findings that the rates which would be in effect if the proposed schedules were put in force would result in undue discrimination, preference, and prejudice in violation of Sections 2 and 3 of the Interstate Commerce Act, and approved rates which would be reasonable *per se* and would result in fair and reasonable rate relationships between the various points of origin as well as between the Illinois, Indiana, and Kentucky groups. (263 I. C. C. 201, 203, 207, 217, 219.) Appropriate findings were also made with respect to the burden on interstate commerce, resulting from the low intrastate rates in Illinois. (263 I. C. C. 217.)

Recent general increases in freight rates throughout the nation as a whole have been dis-

regarded herein in describing the rate relationships and rate levels involved in these proceedings.

Upon consideration of the foregoing facts, it is not difficult to dispose of the legal issues involved in this appeal. Appellants' first contention, that the Commission was without jurisdiction, is plainly erroneous. This argument is based upon the assumption that the scope of the Investigation and Suspension proceedings in I. & S. Docket No. 5139 was confined to consideration of the new or changed rates contained in the tariffs under investigation in that proceeding. Appellants claim that the Commission had no authority to consider the lawfulness of previously established rates which were merely republished without change in the tariffs under investigation.

But from the very terms of the Commission's order of July 30, 1942, which instituted the investigation in I. & S. Docket No. 5139, it is clear that the scope of the investigation embraced all the rate schedules enumerated in that order. The schedules therein specifically named include the tariffs naming the Milwaukee single-line rates which that carrier proposed to republish without any increase. Those schedules also include the joint-line rates which the carriers involved propose to republish without change, as well as those which they propose to increase.

Section 15 (7) of the Interstate Commerce Act as amended (49 U. S. C. 15 (7)) empowers the

Commission in an Investigation and Suspension proceeding, after full hearing, to make such an order as would be proper in a proceeding begun after a rate schedule had become effective. Section 15 (1) of the Act (49 U. S. C. 15 (1)), dealing with the Commission's power over rates which have become effective, authorizes the Commission, if it be of opinion that the rates are unlawful in certain respects therein enumerated (including unlawfulness arising from unjust discrimination or undue prejudice or preference), to determine and prescribe the rate thereafter to be observed and to make an order that the carrier "cease and desist from such violation * * * to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate * * * other than the rate * * * so prescribed." These statutory provisions[4] amply sustain the Commission's authority to make the order involved in this case. Numerous Commission and court decisions have held that in an Investigation and Suspension proceeding the Commission may consider the lawfulness of the existing rates as well as of the proposed schedule under suspension. *Akron, C. & Y. Railway Co.* v. *United States*, 22 F. 2 (d) 199,

[4] With respect to intrastate rates, such as the rates from Illinois mines involved in this case, the Commission derives its statutory power from Section 13 (4) of the Act (49 U. S. C. 13 (4)).

203; *Advances in Rates, Western Case*, 20 I. C. C. 307, 314; *Lignite Coal from North Dakota*, 126 I. C. C. 243, 244–5; *Sioux City Terminal Railway Switching*, 241 I. C. C. 53, 73–4.

Furthermore, even if it were true that the Commission's order instituting the Investigation and Suspension proceeding had not specifically covered the rate schedules at issue, it is clear that appellants could not prevail upon so technical an objection. In the case of administrative tribunals such as the Commission, it has always been held by the courts that strict rules of pleading and evidence are not applicable, and an order made after a fair hearing doing substantial justice to the parties will not be set aside by reason of a defect which might have constituted "variance" at common law. *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33; *New York Central Railroad Company* v. *Interstate Commerce Commission*, 168 Fed. 131, 138–9; *Chesapeake & Ohio Railway Company* v. *United States*, 11 F. Supp. 588, 592; *Alton & Southern Railroad* v. *United States*, 59 F. (2d) 414, 429–30; *Pennsylvania Railroad Company* v. *United States*, 288 Fed. 88, 91; *Spiller* v. *Atchison, Topeka & Santa Fe Railway Company*, 253 U. S. 117, 131–2.

Not only is it true here, as in the *Spiller* case, that the Commission did not act upon evidence of which the appellants were not cognizant and to which they had no opportunity to reply, but appel-

lants' present contention that the Commission was without authority to consider the lawfulness of the existing rates amounts to a complete reversal of their position in the proceeding before the Commission.

Before the Commission appellants urged that the Commission pass upon the existing rates and establish a lawful adjustment of rates and rate relationships affecting all the mines in Illinois, Indiana, and Western Kentucky. The testimony offered by appellants' witnesses, the exhibits, briefs, exceptions to Examiner's proposed report, and other documents in the record are replete with statements showing that petitioners invited the Commission to decide the issues which it did decide.[8] In the exceptions to the Examiner's proposed report filed by the Coal Trade Association of Indiana the following language occurred:

> In these proceedings, under the issues involved in the Investigation and Suspension case and the 13th Section case, the present record is sufficient for the Commission to determine the propriety of the level of the rates from the mines in Illinois and Indiana to these destinations in northern Illinois and Beloit, and the differentials to apply as between the mine origin groups in said States in the movement of coal to such destinations. (P. 17.)

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[8] Tr. 1793–4, 1845–50, 1857–8, 1874–6.

Further on in the same document the following appears:

> The jurisdiction of the Commission under its investigation and suspension powers and under its powers contained in the 13th section of the Act are entirely adequate to dispose of all of the issues here involved on this present record, a record of over 2,000 pages of evidence and over 150 exhibits.
>
> This record shows the rate from every origin group in Illinois and every shipping group in Indiana to this territory. * * * The rates and distances from every competitive group within the State are shown in this record. The record shows the transportation conditions within Illinois and from Indiana to these destinations to be the same. There is no evidence omitted from this record which is necessary for a decision of these issues. Why postpone again to a future proceeding, whether by way of arbitration or by way of some hitherto unknown type of proceeding before this Commission, the question of the final disposition of the issue of the proper relationship and measure of the rates from these two competing sets of origin groups in Illinois and Indiana to this important destination territory? As pointed out in the Report, there has been almost constant litigation before this Commission since the intrastate rates in Illinois were reduced in 1930. Now after fourteen years we have

> a record and issues under which a final order can be made settling the whole matter. We urge that the Commission exercise the jurisdiction conferred on it by the Act, and enter an order based on the facts, removing once and for all the unlawful discrimination which the present intrastate rates within Illinois to the destinations involved subject interstate commerce in coal from Indiana to those same destinations, and remove the unlawful prejudice to which the Indiana producers are subjected and the unlawful preference now enjoyed by the Illinois producers shipping to such destinations, and that there be no further postponement in making effective within this territory a rate adjustment that is fair and reasonable to all concerned, a rate adjustment that protects the interests of the consumer as well as of the producers of coal in this territory. (P. 111–12.)

Appellants' dissatisfaction with the Commission's procedure arose only when the Commission's decision rejected appellants' recommendations regarding the rate relationships to be established. Appellants wished the rates of the other carriers to be adjusted to conform with those of the Milwaukee, rather than that the Milwaukee's rates be brought into conformity with those of the other carriers involved. In other words, appellants merely wish the Court to substitute its judgment for that of the Commission in dealing

with a troublesome question of rate making. This, of course, would be contrary to the established principles regarding the respective functions of the Commission and the courts in matters of rate making. *Virginian Railway Company* v. *United States*, 272 U. S. 658, 665; *Mississippi Valley Barge Line* v. *United States*, 292 U. S. 282, 286–7.

Examination of the Commission's painstaking report shows that it considered the pertinent factors and made appropriate findings. *B. & O. Railroad Company* v. *United States*, 305 U. S. 507, 524; *C. B. & Q. Railroad Company* v. *United States*, 60 F. Supp. 580, 584. It was proper for the Commission in order to determine the appropriate rates to be charged, to make comparisons with other similar rates, as well as to consider the distances and transportation conditions involved. *St. Louis Southwestern Railway Company* v. *United States*, 245 U. S. 136, 145; *Youngstown Sheet & Tube Company* v. *United States*, 295 U. S. 476, 480; *United States* v. *Northern Pacific Railway*, 288 U. S. 490, 500; *Chicago, Rock Island & Pacific Railroad Company* v. *United States*, 274 U. S. 29, 32.

In fact, the Commission in the order complained of was merely complying with the intimations contained in this Court's opinion in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 294 U. S. 499, 509–10, that

the Commission should establish a comprehensive adjustment of the entire coal-rate structure in the area affected. Controversies of long standing regarding coal rates in this area have been the subject of "piecemeal action" from time to time over a long period of years; but the Commission had never prescribed fair and reasonable rate relationships between the competing Illinois, Indiana, and Kentucky groups, as well as between the various mines and points of origin within those groups. This Court in the *Milwaukee* case found that the Commission had not "adjudged the fairness of the relation" between rates from Illinois and Indiana. The Court admonished the Commission that "the whole situation is subject to the power of the Commission" and that the Commission should exercise its power to "conduct a comprehensive inquiry into the rates of all the lines within the area of controversy," in which it "may fix the fair relation between one line and another, and may build the structure of the rates accordingly."

What the Commission has done in its present order is merely to carry out the directions given by this Court in that case.

Another contention urged by appellants is equally unsound. Relying upon *Texas and Pacific Railway Company* v. *United States*, 289 U. S. 627, 650, appellants claim that the Commission's order is invalid because of the Milwaukee's alleged lack

of effective control over the joint-line rates. They also claim that the order is invalid because it does not leave the carriers an alternative to remove the discrimination either by lowering the higher rates or by increasing the lower rate.

A complete answer to this contention is found in the fact that the order in the present case was one made under Section 15 of the Act, and not under Section 3. The rule relied upon by appellants is applicable only to a Section 3 order. This distinction was recognized in the *Texas and Pacific* case itself;[6] and also was clearly explained in *Youngstown Sheet & Tube Company* v. *United States*, 295 U. S. 479, and in *New York* v. *United States*, 331 U. S. 284, 341.

Moreover, in fact, the Milwaukee does effectively participate in the rates found to be unlawful and has control over these rates. The Milwaukee was under no obligation to participate in the higher joint-line rates, but voluntarily chose to do so. It cannot escape responsibility for unlawfulness thus created by the establishment of a dual basis of rates as a consequence of its own action. Such participation resulted, among other things, in undue preference to shippers and origins on its single line, for which the Milwaukee is clearly responsible. Furthermore, the Milwaukee cannot seriously contend that it does not control the rates over its own line; hence, in fact, it

[6] See 289 U. S. at 650, fn. 39.

lies within the Milwaukee's power, by adjusting its own single-line rates to eliminate the existing discriminations. It is only the attitude of the Milwaukee that prevents unanimity among all the carriers themselves.

But the Milwaukee argues that its initiative in rate making must be respected. However, while it is true that carriers have the initiative in rate making,[7] it is equally true that such carrier-made rates are subject to the regulatory powers conferred by law upon the Commission. Where discrimination or undue preference or prejudice is found to exist, the Commission's power to prescribe rates comes into play. The Commission may remove a discrimination effected by rates, even when they are within the zone of reasonableness, if the discrimination is forbidden by Section 3 (1) of the Act. *New York* v. *United States*, 331 U. S. 284, 344.

There can be no doubt with respect to the existence of unjust discrimination and undue preference and prejudice in this case, since the difference between the Milwaukee's single-line rates and its joint-line rates do not reflect any sub-

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[7] *United States* v. *Illinois Central Railroad Company*, 263 U. S. 515, 522; *Arizona Grocery Company* v. *Atchison, Topeka & Santa Fe Railroad Company*, 284 U. S. 384; *United States* v. *Chicago, Milwaukee, St. Paul & Pacific Railroad Company*, 294 U. S. 499, 506; *Georgia* v. *Pennsylvania Railroad Co.*, 324 U. S. 439, 459.

stantial difference in transportation conditions. The Commission found that:

> The transportation conditions over the single-line routes of the Milwaukee and the Illinois Central do not differ materially from those over the joint-line routes to the same destinations from other mines in the same group, in many of which latter routes, as stated, the Milwaukee and the Illinois Central participate. There is no important difference in the average distances over those respective routes. Normally, coal sales turn on a price difference of as little as a few cents a ton. Plainly, therefore, only by the establishment and maintenance of a single-rate basis from each of these coal-rate districts can unjust discrimination and undue prejudice be avoided. (263 I. C. C. at 195.)

For the foregoing reasons, it is clear that this appeal presents no substantial questions. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(Signed) Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.

(Signed) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

FEBRUARY 1948.

I certify that a copy of the foregoing motion to affirm was this day mailed to the counsel for appellants.

This 3d day of February, 1948.

(signed) Edward Dumbauld,
EDWARD DUMBAULD,
Special Assistant to the Attorney General.